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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 979

11,000 ACRES OF LAND, MORE OR LESS, SITUATED IN SMITH COUNTY, TEXAS, GENERAL CRUDE OIL COMPANY, ET AL., OWNERS OF TRACT NO. E-419, *Petitioners,*

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

C. G. CALHOUN,
Counsel for Petitioners.

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11,000 ACRES OF LAND, MORE OR LESS, SITUATED IN SMITH COUNTY, TEXAS, GENERAL CRUDE OIL COMPANY, ET AL., OWNERS OF TRACT NO. E-419,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, General Crude Oil Company, a corporation, and Brady P. Gentry and Carl Shamburger, pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above cause on the 21st day of December, A. D., 1945, reversing in part and affirming in part

the judgment of the District Court of the United States for the Eastern District of Texas.

Questions Presented

I

Whether land which is condemned by the United States for military purposes under provisions of the Second War Powers Act, as amended, should be valued, for the purpose of compensating the owners, at the time the declaration of taking was filed pursuant to the provisions of the Declaration of Taking Act (46 Stat. 1421-1422 c. 307, 40 U. S. C. Sec. 258a-258e), or at the time actual possession was taken by the Government.

II

Whether the owners of land which was condemned by the United States for a term of years extendable annually for an indefinite period at its option, should be limited in compensation to the annual rental value of the surface of the land, when it is shown that the oil and gas rights therein possessed a definite market value which was greatly depreciated because of the exclusive taking and possessing by the Government.

III

Whether the owner of the subsisting oil and gas lease affecting land condemned by the United States for a term of years extendable annually for an indefinite period at its option, thereby causing great depreciation in the market value of such lease at the time of taking because of the Government's exclusive possession of the land, is entitled to have full and final compensation determined in one hearing rather than in a series of separate hearings each encompassing only the damages sustained for a particular year.

Statutes Involved

(a) Title II of the Second War Powers Act of August 18, 1890, 26 Stat. 316, c. 797, as amended by the Acts of July 2, 1917, 40 Stat. 241, c. 35; April 11, 1918, 40 Stat. 518, c. 51, 50 U. S. C. Sec. 171; and March 27, 1942, 56 Stat. 176, 177, c. 199, Sec. 201, 50 U. S. C. Supp. IV, Sec. 1718.

(b) Declaration of Taking Act of February 26, 1931, 46 Stat. 1421-1422, c. 307, 40 U. S. C. Sec. 258a-258e.

Statement

Condemnation proceedings were instituted by the United States at the instance of the Secretary of War in the District Court of the United States for the Eastern District of Texas at Tyler on March 26, 1943, for the purpose of condemning 11,000 acres of land, more or less, situated in Smith County, Texas, for use as a military training center (R. 1-17). Included among such lands was a tract containing 91 acres designated as Tract No. E-419, which is owned by the petitioners Brady P. Gentry and Carl Shamburger. At the time such proceedings were filed said tract was encumbered with an oil and gas lease held by the petitioner General Crude Oil Company, which had been executed on May 10, 1937, extending for a primary term of ten years from said date, and providing for annual delay rentals in lieu of drilling operations in the sum of $1.00 per acre (R. 105).

According to the allegations in the petition for condemnation "the estate to be taken in and to said land is a term for years ending June 30, 1943, together with the right to extend said term for additional yearly periods thereafter during the existing national emergency, at the election of the Secretary of War" (R. 12). Contemporaneously with the filing of the petition for condemnation an

order was entered by Hon. Randolph Bryant, United States District Judge for the Eastern District of Texas authorizing the Government to take immediate possession of the lands described in the petition (R. 18-30). A finding was made in the judgment entered by the District Court that actual possession of the land was taken on April 1st, 1943 (R. 125).

In accordance with the provisions of the Declaration of Taking Act (Act of February 26, 1931, 40 Stat. 1421-1422, c. 307, 40 U. S. C. Sec. 258a) a declaration of taking was filed in the name of the Secretary of War on November 19, 1943, respecting the tract here under consideration (R. 57-60). Judgment was duly entered on such declaration of taking on November 27, 1943, containing the following recitations:

> "It is therefore, Ordered, Adjudged and Decreed by the Court that an estate for a term of years commencing April 1, 1943, and ending June 30, 1944, extendable for yearly periods thereafter during the existing national emergency at the election of the United States * * *" (R. 63).
>
> "was and is vested in the United States of America upon the filing of said declaration of taking and the deposit in the registry of this Court as hereinafter recited of the said sum of One Thousand, Eight Hundred Two and 50/100 ($1,802.50) Dollars; and an estate for a term of years commencing April 1, 1943, and ending June 30, 1944, extendable for yearly periods thereafter during the existing national emergency at the election of the United States * * * is deemed to have been condemned and taken for the use of the United States of America, and the right for just compensation for the same thereby vested in the persons entitled thereto, the amount of said compensation to be ascertained and awarded in this proceeding and established by judgment herein as provided by law." (R. 64)

Upon hearing before Special Commissioners appointed by the District Court to consider and determine damages resulting from the condemnation, the petitioner General Crude Oil Company, as the owner of the subsisting oil and gas lease, was awarded the sum of Eleven Thousand, Three Hundred, Seventy-five ($11,375.00) Dollars, and petitioners Gentry and Shamburger, as the owners of the fee title to the land, including the oil, gas and mineral rights therein subject to said lease, were awarded the sum of Nine Thousand, One Hundred ($9,100.00) Dollars (R. 67-68). Exceptions to the report and award of the Commissioners being taken by the Government, the matter came on for review before the United States District Court for the Eastern District of Texas, at Tyler (R. 68-69).

The undisputed evidence on the trial disclosed that the land in question is located in less than one and one-half miles of a deep test well for the discovery of oil and gas which was in process of drilling at the time of the institution of the condemnation proceeding (R. 78-79); that on April 19, 1943, the petitioner General Crude Oil Company, pursuant to due application, obtained permit from the Railroad Commission of Texas to drill a well on the tract in controversy (R. 119), but was refused permission by the War Department to enter upon the land for such purpose (R. 114); that some six producing oil wells had been drilled and completed and were producing oil in the vicinity of this land at the time of the trial (R. 81).

The contentions which these petitioners urged on the trial are summarized as follows:

> (1) That their damages should be measured by the depreciation in the market value of the property taken, which is represented by the difference between the market value of such property immediately before and immediately after the taking;

(2) That inasmuch as the taking by the Government was exclusive and prohibited the development of the land for oil and gas purposes, the market value of the oil and gas rights in the land was greatly depreciated by the taking, to the damage of both the lease owner and the land owners who had reserved an one-eighth oil, gas and mineral interest under the terms of the lease;

(3) That a declaration of taking having been filed and judgment entered thereon, as provided by the Declaration of Taking Act, the Court was required to evaluate the depreciation in market value as of the date the declaration of taking was filed.

During the trial the petitioner General Crude Oil Company, offered to prove as a basis of the damages it sustained by virtue of the condemnation the fair market value of its leasehold estate on March 26, and April 1st, and November 19, 1943, and the resulting depreciation and diminution in such value on and after such dates caused by such condemnation. However, the trial court refused to permit introduction of such evidence and limited the evidence to proof of the fair cash annual rental of the lessee's rights under the oil and gas lease, which the court found to be $1.50 per acre. Likewise the petitioners Gentry and Shamburger offered similar proof to show the depreciation in the market value of the land and oil and mineral rights therein resulting from the Government's taking, but such proof was also rejected by the trial court. Their damages were limited to the annual rental value of the surface of the land, which was fixed at $1.50 per acre (R. 85-86, 96-98, 99-100). Judgment was entered accordingly (R. 123).

An appeal was perfected by the petitioners herein to the Circuit Court of Appeals for the Fifth Circuit which reversed the judgment of the District Court as to the lease holder, General Crude Oil Company, but affirmed the judg-

ment as to the land owners, Gentry and Shamburger. The opinion of the Circuit Court is reported in 152 Fed. (2d) 566. Succinctly stated the holdings of the Circuit Court of Appeals are as follows:

> (1) The proper date for evaluating the property taken in the condemnation proceeding under consideration was the date the Government took possession of the property, to-wit, April 1, 1943, rather than the date declaration of taking was filed, being November 19, 1943;
>
> (2) The full measure of damages to which the land owners Gentry and Shamburger are entitled is the rental value of the surface of the land calculated on an annual basis and that no recovery is allowable in depreciation in the market value of the oil, gas and mineral rights in the land;
>
> (3) Whereas, the lease owner is entitled to recover the amount of depreciation in the market value of the lease resulting from the condemnation, such damages may not be ascertained fully and finally in one proceeding as of the date of the taking, but same must be determined for each year's taking separately pursuant to separate hearings relating to the damages suffered during each one year period only (R. 134-39).

While concurring in the decision of the majority in affirming the judgment of the District Court as to Gentry and Shamburger and in reversing it as to General Crude Oil Company, Circuit Judge Sibley delivered a dissenting opinion in which he disagreed with the majority holding respecting the method of determining the damages to be awarded to the lease owner on an annual piecemeal basis. Judge Sibley expressed the belief that the awarding of damages to the lease owner should be held in abeyance until such time as the lease should expire by its own terms or the land should be released by the Government, whichever be the sooner (R. 139-141).

Specification of Errors

1. The Circuit Court of Appeals erred in holding that the value of the property condemned was properly determined as of the date possession was taken by the Government;

2. The Circuit Court of Appeals erred in limiting the compensation awarded the land owners by virtue of the condemnation to the annual rental value of the surface only;

3. The Circuit Court of Appeals erred in refusing to allow the land owners to recover compensation for damages sustained to the oil and gas rights in the land condemned;

4. The Circuit Court of Appeals erred in holding that the compensation to which the owner of the oil lease affecting the condemned land is entitled must be determined in separate hearings for each year the land is taken.

Reasons for Allowance of Writ

1. The questions presented in this petition have not been settled by the Supreme Court. In fact, the questions raised herein, which relate to the measure of damages which should be awarded in proceedings of this character have not been decided previously by any appellate court in so far as we are able to ascertain. That these are questions of first impression and unusual importance is confirmed by the following statements contained in the dissenting opinion of Circuit Judge Sibley in the instant case, to-wit:

> "This case seems to be the first determined by an appellate court which deals with the measure of compensation when property is taken by the United States for a short period only but with an asserted right of renewal for annual periods during the emergency; and

the first to deal with the compensation due the owner of an oil and gas lease which is interfered with but not expressly taken. I regard it as important in both these aspects" (R. 139).

2. During the war years vast properties throughout the nation were acquisitioned by the United States under the prerogatives prescribed in the Second War Powers Act. In numerous instances, as here, the lands taken were not condemned in absolute fee, but they were taken for an indefinite period, denominated "a term for years," extendable annually at the option of the Government. Great confusion and lack of uniformity appears to have been manifested in the decisions of many of the lower courts respecting the correct method to be followed in determining the damages in such cases. Witness the decisions of District Courts in *United States* v. *9.94 Acres of Land in the City of Charleston*, 51 Fed. Supp. 478; *United States* v. *60,000 Square Feet of Land and Eight Story Hotel thereon known as Oakland Hotel*, 53 Fed. Supp. 767, and *United States* v. *Bauman*, 56 Fed. Supp. 109; wherein it is held that in proceedings similar to the one at bar the owners compensation shall not be limited to the bare rental value of the premises, but same shall comprehend every factor which evidences the deprivation to the owner. Whereas there are other decisions of District Courts which cling to the view that full compensation in this type of condemnation proceeding consists in the awarding of annual rental only. See *United States* v. *16.747 Acres of Land*, 50 Fed. Supp. 389, and *United States* v. *Certain Parcels of Land*, 55 Fed. Supp. 257.

In view of the apparent unsettled state of the law and the general importance of the subject, it is submitted that it is a matter of unusual gravity that these questions be decided by the Supreme Court for the guidance of the inferior courts in disposing of the great number of similar cases

that are either now pending or will most likely be instituted in the near future.

3. The decision of the Circuit Court of Appeals that the land owners, Gentry and Shamburger, are limited in their recovery of damages only to the rental value of the surface of the land condemned is in conflict with the decision of this Honorable Supreme Court in *United States* v. *General Motors Corporation*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 379, wherein it is decided that even in cases where the Government has taken only the temporary occupancy of premises, the owner's compensation may encompass other elements of damage than mere rental value, and that among other elements that should be considered is depreciation in value of the property occupied resulting from the taking.

4. The effect of the decision of the Circuit Court of Appeals is to deny to petitioners Gentry and Shamburger, the land owners, their right to that "just compensation" guaranteed to them by the Fifth Amendment to the Constitution, in that no recovery whatever is permitted them herein for the depreciated value of the oil, gas and mineral rights in the land, which unquestionably was the most substantial and valuable right affected by the condemnation.

5. The decision of the Circuit Court of Appeals that the proper date for evaluating property condemned in instances even where the procedure prescribed in the Declaration of Taking Act is followed is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *150.29 Acres of Land, More or Less, in Milwaukee County, Wis.*, 135 F. (2d) 878, and the decision of the Circuit Court of Appeals for the Third Circuit in *United States* v. *576.734 Acres of Land in Montgomery County, Pa.*, 143 F. (2d) 408; wherein it was expressly held that the correct date for valuing property condemned is the date the declaration of taking is filed.

6. This cause involves a construction and interpretation of a statute of the United States, to-wit, *40 U. S. C., Sec. 258a, of the Declaration of Taking Act of Feb. 26, 1931,* which expressly provides that, "upon filing of the declaration of taking and of the deposit in court • • • title to the land • • • shall vest in the United States of America and said land shall be deemed *to be condemned and taken* (emphasis ours) for the use of the United States and the right to just compensation for same shall vest in the persons entitled thereto."

In view of the well settled rule that property condemned shall be valued for compensation at the date of taking (*United States* v. *Miller,* 317 U. S. 369, 87 L. Ed. 336), it is respectfully represented that the holding of the Circuit Court of Appeals in the case at bar fixing the time for valuation at the date of actual entry is in derogation of the foregoing statute which expressly stipulates that the date of taking is the date the declaration of taking is filed.

WHEREFORE, your petitioners, referring to their accompanying brief in support of this petition, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Honorable Supreme Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket, "11,000 ACRES OF LAND, MORE OR LESS, SITUATED IN SMITH COUNTY, TEXAS, GENERAL CRUDE OIL COMPANY, ET AL., OWNERS OF TRACT No. E-419, versus UNITED STATES OF AMERICA, No. 11,444"; and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your peti-

tioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

C. G. CALHOUN,
P. O. Box 629,
Tyler, Texas,
Counsel for Petitioners.

THE STATE OF TEXAS,
County of Smith:

GALLOWAY CALHOUN, being duly sworn, on oath deposes and says that he is counsel for the petitioners, General Crude Oil Company, and Brady P. Gentry and Carl Shamburger; that he has knowledge of this litigation, and that the foregoing petition and the matters therein set forth are true to the best of his knowledge, information, and belief.

C. G. CALHOUN.

Subscribed and Sworn to before me by Galloway Calhoun, this the 14th day of March, A. D., 1946.

ALICE NIBLACK,
Notary Public in and for
Smith County, Texas.
[SEAL.]

My commission expires June 1, 1947.

I do hereby certify that I have carefully examined the foregoing petition for Writ of Certiorari and the allegations thereof are true as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petitioners should be granted by this Court.

C. G. CALHOUN,
P. O. Box 629,
Tyler, Texas,
Counsel for Petitioners.

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SUPREME COURT, U. S.
FILED
MAR 21 1946
CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1945

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v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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11,000 ACRES OF LAND, MORE OR LESS, SITUATED IN SMITH COUNTY, TEXAS, GENERAL CRUDE OIL COMPANY, ET AL., OWNERS OF TRACT NO. E-419,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.
THE OPINIONS OF THE COURTS BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit in this case is reported in Vol. 152, Pages 566-570 of the Federal Reporter, Second Series.

No opinion was delivered in the District Court.

II.
JURISDICTION

The jurisdiction of this court is based upon Judicial Code, Section 240, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938; U. S. C. 28, Sec. 347.

III.

STATEMENT

The essential facts of the case are fully stated in the petition for Writ of Certiorari filed by the petitioners in this cause, to which reference is here made. In the interest of brevity same are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the value of the property condemned was properly determined as of the date possession was taken by the Government;

2. The Circuit Court of Appeals erred in limiting the compensation awarded the land owners by virtue of the condemnation to the annual rental value of the surface only;

3. The Circuit Court of Appeals erred in refusing to allow the land owners to recover compensation for damages sustained to the oil and gas rights in the land condemned;

4. The Circuit Court of Appeals erred in holding that the compensation to which the owner of the oil lease affecting the condemned land is entitled must be determined in separate hearings for each year the land is taken.

V.

SUMMARY OF THE ARGUMENT

POINT A.

The procedure prescribed in the Declaration of Taking Act of February 26, 1931, having been followed by the Government in this cause, the value of the property affected by the condemnation for the purpose of fixing compensation should be determined as of the date the Declaration of Taking was filed, which under the provisions of said Act is the "date of taking."

POINT B.

The land involved herein having been condemned by the Government for a term of years extendable indefinitely at its option, the compensation awarded the land owners should not be limited to the annual rental value of the surface only, but same should also comprehend the depreciation in market value of the land and the oil and gas rights therein resulting from the exclusive taking by the Government.

POINT C.

The damages sustained by the owner of the oil and gas lease affecting the land condemned should be ascertained and awarded fully and finally in one proceeding and judgment and not in deferred installments pursuant to a series of separate hearings and orders based on each year's occupancy of the land by the Government.

VI.

ARGUMENT

POINT A.

The procedure prescribed in the Declaration of Taking Act of February 26, 1931, having been followed by the Government in this cause, the value of the property affected by the condemnation for the purpose of fixing compensation should be determined as of the date the Declaration of Taking was filed, which under the provisions of said Act is the "date of taking."

One of the important questions presented herein, and one which we submit has not been settled heretofore by the Supreme Court, is whether or not the correct date to evaluate property condemned by the Government in cases when the procedure prescribed by the Declaration of Taking Act is followed, is the date when actual possession of the land was taken, or the date when the declaration of taking was filed. In the instant case, the trial court found that the Government entered into possession of the land involved herein on April 1, 1943. The date the declaration of taking was filed respecting said land was November 19, 1943. Counsel for the Government insists that all evidence relating to values should be confined to the former date, April 1, 1943; whereas, petitioners urge that the correct date to which such values should be related is the date the declaration of taking was filed, on November 19, 1943. The Circuit Court of Appeals sustained the position of the Government on this question. (R. 141.)

By Act of Congress of February 26, 1931, known as the Declaration of Taking Act (46 Stat. 1421-1422, c. 307, 40 U. S. C., Secs. 258a-258e, quoted in Appendix), the procedure to be followed in condemnation of property for Federal projects was amended and amplified in certain particulars, the principal purpose of which was to permit the taking of property by condemnation in advance of final judgment. Theretofore it had been a prerequisite to the vesting of title that final judgment must be entered. However, by virtue of the aforesaid Act of February 26, 1931, a Federal agency is empowered to cause the title to land to vest in the Government in a condemnation proceeding before final judgment by the process of filing what is denominated a "declaration of taking" and depositing with the Clerk of the Court a sum of money representing the estimated just compensation of the land taken.

It is to be recognized that by virtue of the Second War Powers Act, the Secretary of War, or the Secretary of Navy, or other Federal agency authorized by the President, is empowered to take immediate possession of property upon or after the filing of the condemnation petition, notwithstanding any other law. Said statute further stipulates that such property may be thus used and occupied even prior to the approval of title by the Attorney General, as otherwise required by statute. The evident purpose of such legislation was to authorize the military authorities of the Government to go into immediate possession and occupancy of lands desired for military purpose, even in advance of the filing of a declaration of taking; but there is nothing in such statute to indicate that the provisions

of the law relating to the filing of declarations of taking and deposit of estimated compensation were in any wise dispensed with.

The conclusion is borne out by the very fact that in the instant case the Government actually followed proceedings contained in the Declaration of Taking Act by filing declarations of taking and making the estimated deposits of compensation in the office of the Clerk of the Court, and otherwise complying with the provisions of said statute. Substantiation of this statement is further found in the judgment which was entered by the court below on the declaration of taking which was filed herein. (R. 60-65.)

Counsel for the Government takes the position that the Government was not obligated to file a declaration of taking in this case, but that it could have proceeded otherwise to effect condemnation. Be that as it may, it conclusively appears that in the instant case the Government did elect to follow the procedure prescribed in *Section 258a, Title 40*, by filing a declaration of taking and making deposit in court, as therein required. Consequently, inasmuch as the Government chose to follow the procedure prescribed in said statute, it necessarily has become bound by the terms of the provisions thereof and the rights of all parties should be determined in accordance therewith. It is, therefore, wholly beside the point to consider what might have been the legal effect upon the rights of the parties if some other course of procedure had been undertaken.

Generally speaking, unless otherwise provided by special statute, the rule of law seems to be well settled that in condemnation proceedings the value of the property condemned

shall be fixed and determined as of the time of the taking. This rule was reannounced in a recent case by the Supreme Court of the United States in *United States v. Miller*, 317 U. S. 369, 87 L. Ed. 336, in an opinion by Justice Roberts, in which it is stated:

> "Respondents correctly say that value is to be ascertained as of the date of the taking."

Likewise, in *Danforth v. United States*, 308 U. S. 271, 84 L. Ed. 240, it is said:

> "Just compensation is valued at the time of the taking. The Congress in other situations has adopted the time of taking as the date for determination of value."

The last sentence in the above quotation is peculiarly significant upon the question under discussion. This is for the reason that the "other situations" mentioned in the opinion wherein Congress has fixed the time of taking as the date for determining value, has specific reference to *Section 258a, Title 40*, as is disclosed by the footnote appended to the Court's opinion. In other words, it conclusively appears from the foregoing that the Supreme Court has expressly construed the provisions of *Section 258a, Title 40*, to mean that the date of taking as therein fixed is the appropriate time to determine the value of the property taken.

This being true, it is now only necessary to examine the phraseology of the statute itself (Appendix), for the purpose of ascertaining the time thereby fixed as the date of taking. A mere reading of the statute, in our opinion, clearly establishes that the date of taking is the date when

the declaration of taking is filed and the deposit of estimated compensation is made in court. We take the liberty of quoting in condensed form that portion of *Section 258a* which has direct bearing on the question under discussion, as follows:

> "Upon the filing of said declaration of taking and of the deposit in court * * * title to said land * * * shall vest in the United States of America and said lands *shall be deemed to be condemned and taken* for the use of the United States and the right to just compensation for same shall vest in the persons entitled thereto." (Emphasis ours.)

In accordance with the provisions of the foregoing statute, the immediate effects of the filing of declaration of taking and of the deposit in court are three-fold, to-wit: (1) The title to the land sought to be condemned then vests in the United States; (2) said land shall then be deemed to have been condemned and taken for the United States; and, (3) right to compensation for the land taken shall vest in the owners of same. Thus it is provided in express language that not until a declaration of taking has been filed and a deposit made in court shall land sought to be condemned be deemed to have been *taken*. We therefore submit that this language of the statute itself conclusively determines the issue now under consideration, because by express statutory provision the exact time of taking is fixed as the date the declaration of taking is filed.

We are not without judicial authority in support of the aforesaid construction which we have placed upon the pro-

visions of the statute under consideration. First we refer to the case of *United States v. 150.29 Acres of Land, more or less, in Milwaukee County, Wisconsin, reported in* 135 Fed. (2d) 878. The decision in this case was rendered by the Circuit Court of Appeals for the Seventh Circuit on May 19, 1943. Here, as in the instant case, petition for condemnation was filed by the Government and order for immediate possession was entered by the court on the same date, to-wit, April 20, 1942. However, declaration of taking was not filed until November 10, 1942. It appears, however, that the Government actually entered into possession of the land on April 30, 1942, about ten days after the petition in condemnation was filed. The issue in the case was whether or not the land was subject to state taxes which were assessed on May 1, 1942, which was after the Government went into possession of the premises but before the declaration of taking was filed. According to the opinion of the court the following question was posed for determination: "The question arises, when did the United States take the land in question?" The court's answer to this question is reflected in the following language of the opinion:

> "As to the first question, we think the property in this case was taken as of November 10, 1942 (the date the declaration of taking was filed.) The statute seems to us clear on that point (reference is here made in footnote to Section 258a, Title 40). When the declaration of taking was filed in the condemnation proceedings and the compensation agreed upon was paid into

the court, the title sought to be taken vested in the United States and the interest of the United States sought became the property of the United States.

"* * * Here * * * the United States did file a declaration of taking and paid the stipulated fair cash market value of the property into court. Up until that time, the condemnor might have discontinued and abandoned its efforts. Danforth v. United States, 308 U. S. 271, 284, 60 S. Ct. 231, 84 L. Ed. 240. Under such circumstances we think that the taking was as of November 10, 1942, when the declaration of taking was filed and the money paid into the court."

In *The United States v. 576.734 Acres of Land, in Mongomery County, Pa.*, 143 Fed. (2d) 408 (decided by the Circuit Court of Appeals for the Third Circuit), the Government condemned a farm which was under lease. The question involved in the appeal was the extent of the award to which the lessee was entitled. The court expressly held that such valuation should be assessed as of date the declaration of taking was filed in said cause, to-wit, March 23, 1942. In this connection the court said:

"The basic question to be determined was the value of the tenant's lease. The chief item in that value was the worth of the growing crop on March 23, 1942. The evidence concerning the nature of this piece of land, plus the history of growing crops in the neighborhood for the season was only relevant insofar as it gave a basis for determining the value of that crop on March 23."

The question under discussion was also decided in the opinion of the recent case of *The United States v. Bennett*, 53 Fed. Sup. 670, rendered by Judge Lewis B. Schwellenbach, (now Secretary of Labor). In that case the declaration of taking was filed on November 16, 1942, and contemporaneously therewith the Government made a deposit in court as estimated damages. Here there was a controversy concerning who should be entitled to the compensation to be awarded, and in order to decide the same the ownership on the date of fixing damages became material. In reaching his conclusion, the court made the following observation:

> "The determination of the persons entitled to compensation out of the award must be made as of November 16, 1942, the date of the filing of the declaration of taking, 'For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or a later date, receives payment'." (Citing *Danforth v. U. S., supra.*)

As is stated in the opinion in the *Milwaukee case*, the Government in a condemnation proceeding is privileged to abandon a projected condemnation at any time prior to the filing of a declaration of taking. This pronouncement finds support in the opinion of the Supreme Court of the United States in *Danforth v. United States, supra*, wherein it is said:

> "Until taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to acceptance by the condemnor, and thus gives to the use of the sovereign power of

> eminent domain an opportunity to determine whether the valuations leave the cost of a completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. 'The owner is protected by the rule that title does not pass until compensation has been ascertained and paid'."

Accordingly, it appears that in a condemnation proceeding, the action of the Government in filing petition and making entry upon the land in advance of the declaration of taking is purely contingent and inconclusive in character. Until the declaration of taking is filed the use of the land by the Government is purely permissive by virtue of the provisions of the *Second War Powers Act*, and in the meantime the Government acquires no title or vested interest whatsoever in the property.

Manifestly it would be unfair and unjust to allow the Government to fix the value of condemned property as of the time it makes entry thereon, when the Government is allowed the privilege of abandoning the property and rejecting title at any time prior to filing of declaration of taking. This statute prescribes no time within which a declaration of taking must be filed. In this case, the declaration of taking was filed nearly eight months after the original petition in condemnation was filed and order of immediate possession was entered thereon. In the interim the Government merely held a statutory option to take the land, which it could abandon at any time. Therefore, under such circumstances it is nothing but fair and

just that the land owners should be compensated on the basis of what their property was worth at the time the Government finally elected to condemn and take the same.

There is one other factor sustaining our position with respect to the question at hand that we believe is worthy of brief consideration. In this connection, we again refer to that portion of Section 258a which provides that "upon the filing of said declaration of taking and of the deposit in court * * * the right to just compensation for the same (real estate) shall vest in the persons entitled thereto." Thus the statute stipulates that the landowner's *right* to compensation for his property shall not vest until the declaration is filed. In other words, unless and until there has been duly made a declaration of taking in accordance with the statute, the landowner can assert no claim for the value of his lands.

Under such conditions it will be unconscionable to compel the land owner to accept a valuation of his premises as of a time far removed from the date when his right to compensation accrues. Certainly, the land owner should not be required to accept the value of his land determined as of a date before the Government should exercise its election to take it.

In the case at bar the Circuit Court of Appeals categorically disposed of the issue now under consideration with the statement in the majority opinion that "where, as here, the declaration of taking is filed on a date subse-

quent to the actual passing of possession, the market value of the property taken should be determined as of the date possession was acquired"; citing United States v. Lynah, 188 U. S. 445; Seaboard Air Line Railroad Company v. United States, 261 U. S. 299; United States v. Rogers, 255 U. S. 163; Olson v. United States, 292 U. S. 246, and United States v. 6.87 Acres of Land, 147 Fed. (2d) 351. (R. 141.)

With all deference and respect it is submitted that the issue here under discussion was neither raised nor remotely suggested in either of the above cases which were cited by the Circuit Court of Appeals in support of its conclusion. At most it may be said that such decisions reaffirmed the well established rule that property condemned should be valued as of the date of taking. However, none of said decisions undertook to construe the provisions of the Declaration of Taking Act with respect to the "date of taking." In fact, the Declaration of Taking Act had not become effective when any of the proceedings involved in the aforesaid cited decisions by the Supreme Court were undertaken. Therefore, it is believed that said cases are in no sense authority contra to our position in this matter, i.e., that inasmuch as the terms of the Declaration of Taking Act declares the date of taking to be the date the declaration of taking is filed, such statutory definition is conclusive for valuing property in all instances where the provisions of the statute are invoked.

POINT B.

The land involved herein having been condemned by the Government for a term of years extendable indefinitely at its option, the compensation awarded the land owners should not be limited to the annual rental value of the surface only, but same should also comprehend the depreciation in market value of the land and the oil and gas rights therein resulting from the exclusive taking by the Government.

Both the trial court and the Circuit Court of Appeals limited the recovery of the land owners in this cause to the rental value of the use of the surface of the land only, calculated on an annual basis. No consideration was given, nor compensation allowed, for damages which accrued to the fee owners by virtue of the oil, gas and mineral rights which they owned, and which in this instance were of far greater value than the surface rights.

According to the well settled rule of property in Texas oil and gas in place constitute a part of the land itself and possess all of the legal aspects of real property. *Texas Company v. Daugherty*, 107 Tex. 226, 176 S. W. 717; *Stephens County v. Mid-Kansas Oil & Gas Company*, 113 Tex. 160, 254 S. W. 290; *Humphreys-Mexia Company v. Gammon*, 113 Tex. 247, 254 S. W. 296. It is also well recognized in Texas jurisprudence that the interest in the oil, gas and minerals which is customarily reserved to the lessor in oil and gas leases in Texas, though commonly denominated "royalty", is in fact real property and possesses all of the legal aspects of such. *Sheffield v. Hogg*, 124 Tex. 290, 77 S. W. (2d) 1021; *Hager v. Stakes*, 116 Tex. 453, 294 S. W.

835; *W. T. Waggoner Estate v. Wichita County* (United States Circuit Court of Appeals, Fifth Circuit), 3 Fed. (2d) 962.

According to the prevailing and uniform practice in Texas the interest in the oil and gas in and under the land in question which was reserved to the lessors by the terms of the subsisting lease was an undivided one-eighth interest thereof. (R. 105-112.) Such interest is commonly the subject of barter and sale and possesses a definite market value. Such is true even though no production whatever may have been had previously. This conclusion is expressly recognized and confirmed by the United States Circuit Court of Appeals for the Fifth Circuit in considering the value of unproven oil and gas leases in *Eagle Lake Improvement Company v. United States*, 141 Fed. (2d) 562, wherein the court made the following comment:

> "In Texas, however, a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estate of great value; indeed, where there is a reasonable possibility of production in paying quantities, mineral rights are a common subject of barter and sale, and therefore have a definite, ascertainable market value, even where the prospects of successful developments are too speculative and remote to be 'reasonably probable'."

Each of the courts below gave indication that the only value that the oil and gas rights which the land owners

possessed in the land in question, in advance of actual production, was expressed in the terms of the provisions in the lease providing that the lessee should pay to the lessors the sum of One Dollar per acre per year in lieu of the prosecution of development operations. Such payments are sometimes incorrectly denominated "delay rentals" but they are in no sense "rentals" within the conception of that term as used in the relation of landlord and tenant. Such "delay rentals" are simply the consideration which the lessee is obligated to pay to the lessor annually for the privilege of deferring lessee's development undertakings in the lease. Under no construction can it be said that the same is the consideration paid by the lessee to the lessor for the privilege of exploiting the oil and gas rights in the land. The meaning of the term "delay rentals" is explained in *Thuss on Texas Oil and Gas*, Second Edition, Sec. 29, Page 108, as follows:

> "These terms (delay rentals) have little in common with the conceptions of the term 'rent' as used in landlord and tenant, since most leases have the effect of conveying the oil and gas in place. Delay rentals exist only to prevent the termination of an estate or right, where the lessee has failed to commence drilling operations. Their office is to delay the commencement of a well without the loss of any right or estate which the lessee has immediately after the execution and delivery of the instrument."

It is true that in the instant case the taking by the Government did not deprive the land owners of the so-called "delay rentals" provided in the lease, because the

record discloses that the lessee continued to pay the same without interruption. (R. 101.) However, by far the most valuable estate which the fee owners possessed was materially affected by the taking, i.e., the one-eighth oil, gas and mineral estate which was reserved to them under the lease.

The exclusive use and occupancy of the land by the Government naturally affected the fee owners' rights to enjoy the benefits and privileges incident to the ownership of such one-eighth reserved interest, in like manner, as the Circuit Court of Appeals herein found and held that such possession affected the rights of ownership of the lessee's seven-eighths interest therein. (R. 138.) By the same reasoning that the Circuit Court of Appeals rejected "the fallacy of the 'fair annual rental' theory" as to the lessee, likewise it should have repudiated the same theory as to the lessors. The Circuit Court of Appeals correctly held, in the case at bar, we think, that the lessee was entitled to recover damages as a consequence of the condemnation measured by the difference in the market value of the leasehold immediately before and immediately after the taking. (R. 139.) We are unable to conceive why a similar conclusion was not reached concerning the oil, gas and mineral estate reserved by the lessors. Each owned an undivided interest in the same estate, and the value of each interest was diminished by the taking.

It may be conceded that because the estate of the lessee was limited to a term of years, lessee's damages were greater than those of the lessors, whose ownership was absolute. Nevertheless, such distinction relates only to a mat-

ter of evidence and does not involve a matter of right. The conclusion is inevitable that by virtue of the taking the land owners suffered a tangible loss in the value of their mineral estate, which was the subject of definite proof. Whether thereby they may have been deprived of an advantageous sale of their reserved estate, or a part thereof, is of no consequence here. Whether such loss in value may be recouped in later years is also immaterial. The controlling factor is the loss in actual value of the lessor's estate which was occasioned by and at the time of the taking.

The word "taken" as used in the Fifth Amendment in relation to compensation recoverable thereunder certainly has a broader meaning than merely the actual physical property itself. The opinion of the Supreme Court rendered during the past year in *United States v. General Motors Corporation*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 379, 156 A. L. R. 390, is respectfully referred to in support of this proposition. Clarifying the meaning, import, and effect of the language used in the Fifth Amendment providing that private property shall not be taken for public use without just compensation, Justice Roberts, who wrote the opinion in the case above cited, makes the following pertinent observations:

> "The critical terms are 'property'; 'taken' and 'just compensaton'. It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the

physical thing, as the right to possess, use and dispose of it. *In point of fact, the construction given the phrase has been the latter.* (Emphasis ours.) When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the short-hand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years', as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

"In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. *The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.* (Emphasis ours.) Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

In cases where the absolute fee simple title to property is condemned in perpetuity, the method of measuring the award is relatively simple. The prescribed rule in such

cases is announced by the Supreme Court in *United States v. Miller*, 317 U. S. 369, 87 L. Ed. 336. The distinction between such instances and those as in the present case is clearly drawn in the opinion in *United States v. General Motors Corporation, supra*, as follows:

> "It is altogether another matter when the Government does not take his entire interest, but by the form of its proceedings chops it into bits, of which it takes only what it wants, however, few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the 'market rental value' for the use of the chips so cut off. This is neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates."

The rule of law permitting the recovery in condemnation cases of compensation for depreciation in value of property taken for a temporary period is also recognized and reaffirmed in the opinion of this Honorable Court in the *General Motors case*, hereinbefore referred to. The specific question there concerned the allowance of damages for fixtures and equipment which were destroyed or depreciated in value as a result of the condemnation of a leasehold interest. On this point Justice Roberts made the following observation:

> "For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his right in land and the structures thereon erected. And it matters not whether they were

taken over by the Government or destroyed, since as has been said, destruction is tantamount to taking. This is true, whether the fixtures and equipment would be considered such as between vendor and vendee, or as a tenant's trade fixtures. In respect of them, the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value. And since they are property distinct from the right of occupancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such."

It may be argued that inasmuch as it has not been established that the land in question is in fact oil bearing then no damage resulted from the abridgement or suspension of the right to explore and develop. It may be further contended that if in fact such land is underlain with oil and gas, same has not been appropriated by the Government and the owners will be privileged to develop and produce the same at the termination of the Government's occupancy. We submit that such argument does not prescribe the right criteria. Irrespective of whether or not the land shall ever yield up a drop of oil or a cubic foot of gas, the fact remains that the oil and gas rights therein possessed a definite market value, as a consequence of the oil development in the immediate vicinity, at the time of its appropriation by the Government, and as a result of the exclusive character of such appropriation, such market value was seriously impaired, if not totally destroyed.

Finally, it may be insisted that the damages sought in depreciated oil and gas value in the property taken are too speculative and uncertain to be the subject of an award in a condemnation proceeding. Such a contention should not appeal to a court whose duty it is to protect the rights of the citizen. It cannot be denied that the petitioners owned very definite and tangible property rights in the land the Government took over and occupied to the exclusion of all others and that by virtue of such taking and occupancy such rights were greatly depreciated. The extent of such depreciation in value was the subject of definite proof, and experts in oil values were tendered to testify regarding such depreciation. Such evidence would have been specific and the dimunition in value would have been expressed in dollars and cents.

If there should be any uncertainty regarding the amount of compensation to which the fee owners are entitled, let it be remembered that it is the Government which instigated the condemnation and determined the nature thereof, the extent of the estate or interest taken, and the length of the tenure. Consequently, it would seem to be but just and fair that any uncertainty as to the amount of compensation should not operate to the disadvantage of the petitioners who were in no sense the actors in the proceeding. Furthermore, it is well recognized that mere difficulty in arriving at the exact amount of damages recoverable con-

stitutes no legal obstacle for denying compensation, when the right to same is shown to exist.

As is said by this Honorable Court in *Eastman Kodak Co. v. Southern Photo Company*, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684:

> "Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate."

POINT C.

The damages sustained by the owner of the oil and gas lease affecting the land condemned should be ascertained and awarded fully and finally in one proceeding and judgment and not in deferred installments pursuant to a series of separate hearings and orders based on each year's occupancy of the land by the Government.

The Circuit Court of Appeals in its decision herein upheld the contention of the petitioners to the extent that it adjudged that the lease owner, the General Crude Oil Company, was entitled to recover compensation for depreciation in the market value of its leasehold estate caused by the condemnation. In virtue of such holding the judgment of the District Court was reversed. (R. 140-141.) However, in so doing the Circuit Court expressed the opinion that such damages should be appraised and assessed on a year-to-year basis throughout the term the Government might elect to retain possession of the land. A formula was prescribed for the trial court to follow in ascertaining damages sustained on such an installment basis. Pursuant to such formula it was directed that a separate hearing or trial be held to adjudicate the amount of damages which the lease owner had sustained for each year the Government continued to retain the premises, and it was ordered that the trial court retain jurisdiction of the case indefinitely for such purpose.

Insofar as the Circuit Court of Appeals decided that the compensation due the lease owner should be fixed on a piecemeal basis, instead of fully and finally in one proceeding, the petitioner, General Crude Oil Company, submits that

the holding of the Circuit Court of Appeals on the question of the award of damages is erroneous. We have been unable to find any statutory authorization either in Federal law or in the Texas statutes relating to condemnation proceedings which authorize such a procedure as has been prescribed by the Circuit Court of Appeals in this connection.

The *Declaration of Taking Statute* expressly recites that upon the filing of the declaration of taking and the deposit in court of the amount of the estimated compensation, title to the lands condemned shall vest in the United States and said lands shall be deemed to be condemned and taken for the use of the United States and the right to just compensation for same shall vest in the persons entitled thereto. Immediately thereafter said statute further expressly recites that "said compensation shall be ascertained and awarded in said proceeding and established by judgment therein." The correct inference, we submit, to be drawn from the foregoing statutory stipulation is whatever compensation the condemnee may be entitled to receive shall be ascertained and awarded in one proceeding and established by a judgment accordingly.

Let us examine again the character and extent of the estate that was condemned in the instant case. According to the pleadings, the declaration of taking, and judgment, the estate taken was "an estate for a term of years commencing April 1, 1943, and ending June 30, 1944, extendable for yearly periods thereafter during the existing national emergency at the election of the United States." (R. 35, 58, 64.)

Analyzing the aforesaid declaration it appears that the property condemned was "an estate for a term of years," which was not necessarily confined to the fifteen-months period between April 1, 1943 and June 30, 1944, but which comprehended an indefinite period thereafter "during the existing national emergency." Consequently, it follows that by virtue of the aforesaid specification the owners of the property condemned and all holding rights thereunder, as well as all those who might deal therewith, were put upon notice that the United States had condemned the property in question for a period commencing April 1, 1943, and extending throughout the existing national emergency, if the Government should choose to retain it for such period.

To be sure no one could then predict the duration of the "existing national emergency" nor definitely anticipate the action of the Government respecting its option to continue possession. Nevertheless, such factors do not negative the conclusion that the extent of the damages occasioned the oil and gas leasehold by the taking was subject to appraisal in one lump sum. The method by which the lease owner attempted to prove the extent of its entire damage is simple, comprehensive and fair, i.e., proof of the market value of the leasehold estate immediately before the taking and proof of its market value immediately after the taking, burdened with an estate for years extendable at the Government's election during the national emergency. The difference between such values represents the damages to the leasehold.

It may be true that the value of the reversionary interest of the lease owner, subject to the contingency stipu-

lated by the Government, might not be precisely ascertained. Nevertheless, the fact remains that such reversionary interest did possess a market value according to the witnesses tendered by the petitioners, and this they attempted to prove.

We have been unable to find a decision by any United States appellate court, other than the case at bar, in which the question now under consideration has been decided. However, it does appear that in several recent opinions rendered by district judges the issue has been rather extensively discussed. In at least three of such opinions the position which we take here has been upheld, to-wit, *United States v. 9.94 Acres of Land in the City of Charleston*, 51 Fed. Sup., 478 (Eastern District of South Carolina); *United States v. 60,000 Square Feet of Land Known as Oakland Hotel*, 53 Fed. Sup. 764 (Northern District of California); and *United States v. Bauman*, 56 Fed. Sup. 109 (District of Oregon). We commend the reasoning, logic and fairness of the conclusions of the judges who wrote the opinions in said cases. Particularly do we take the liberty to refer to the following statement found in the opinion of Judge Goodman in the *Oakland case*:

> "It is clear to me, that it was intended by the Fifth Amendment, and the pertinent statutes enacted to effectuate it, that 'just compensation' does not mean compensation awarded sometime or somewhere. The Government, of course, could have taken the full fee to the property, in which event the factual question of evaluation could be settled according to well-established rules. United States v. Miller, 317 U. S. 369,

63 S. Ct. 276. It elected, however, to take a leasehold term for a military hospital for an indefinite period.

* * * * *

"But by taking this special or particular type or interest in defendant's hotel property, the Government cannot defer payment for the damage, or interest taken, to a later period. Nor can it force defendant, if it chooses, to again litigate its right to compensation in another forum.

"Compensation should be determined by the jury in this proceeding. It has been frequently held that the compensation for the taking of property must be awarded in the condemnation proceeding itself. In East Bay Municipal Utility District v. Lodi, 120 Cal. App. 740, at page 762, 8 P. (2d) 532, at page 541, the court said: 'The law seems to be quite uniform that in eminent domain proceedings the damages must be assessed once and for all, and must include all the damages that might be inflicted by the condemning party.' Id. Sternes v. Sutter Butte Canal Co., 61 Cal. App. 737 216 P. 66."

The manifest wrongs and injustices that will be occasioned the condemnee if the holding of the Circuit Court in this particular be approved, are tremendous. The prospect that a lease holder or a land owner shall be compelled to undergo the expense and the ordeal of a hearing before commissioners and a court trial each year during the Government's indefinite tenure of the land is staggering to one's conception of the administration of justice. Such is contrary to all legal principles which abhor mutiplicity

of action and undertake to promote finality of legal procedure. The undue and unwarranted hardship that would inevitably result from the adoption of such procedure as prescribed by the Circuit Court for awarding damages in this cause could only serve to thwart the ends of justice.

WHEREFORE, petitioners respectfully submit that Writ of Certiorari should be issued as prayed for in Petition for Certiorari filed by the petitioners herein, and that upon hearing and consideration the decision of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed in the particulars and respects herein set forth, and that your petitioners have such other and further relief as to this Honorable Court may seem just and proper. And your petitioners will ever pray.

Respectfully submitted,

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APPENDIX

The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421-1422, c. 307, 40 U. S. C. Secs. 258a-258e, reads as follows:

SEC. 1. (258a) * * * in any proceeding in any court of the United States outside of the District of Columbia which has been made or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right-of-way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to

surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

SEC. 2. (258b). No appeal in any such cause nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

SEC. 3. (258c.) Action under this statute irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

SEC. 4. (258d.) The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. (258e.) In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to ex-

pend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of Section 355, of the Revised Statutes of the United States: Provided, That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 979

11,000 ACRES OF LAND, MORE OF LESS, SITUATED IN SMITH COUNTY, TEXAS, GENERAL CRUDE OIL COMPANY, ET AL., OWNERS OF TRACT NO. E-419, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. The opinion of the circuit court of appeals (R. 134–139) and that of Judge Sibley, dissenting in part (R. 139–141), are reported in 152 F. 2d 566.

JURISDICTION

The judgment sought to be reviewed was entered on December 21, 1945 (R. 142). The petition for a writ of certiorari was filed on March

21, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, when the United States takes possession of property and subsequently files a declaration of taking, the property is properly valued as of the date the United States took possession.

2. Whether fair annual rental of the surface of the land is a proper measure of compensation for the owner in fee of property taken by the United States for a term of years, extendable annually during the national emergency, when the owner had granted a ten-year oil and gas lease and is being paid "delay rentals" by the lessee.

3. A further question, presented by petitioners, but which we believe to be academic in this case, is whether compensation to lessees of an oil and gas lease should be determined annually or in one lump sum, when the interest taken by the United States is for a term of years, extendable annually during the national emergency.

STATUTES INVOLVED

Title II of the Second War Powers Act (Act of March 27, 1942, 56 Stat. 176, 177, c. 199, sec. 201, 50 U. S. C. (Supp. IV) 171a) and the Decla-

ration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, 40 U. S. C. 258a–258e are set out in Appendix A, *infra*, pp. 17–21.

STATEMENT

On March 26, 1943, the United States, at the request of the Secretary of War, instituted proceedings under Title II of the Second War Powers Act to condemn 11,000 acres of land in Smith County, Texas, for use in connection with the Tyler Air Force Replacement Training Center and for the expansion thereof (R. 1–17). The estate sought was a term for years ending June 30, 1943, together with the right to extend said term for additional yearly periods thereafter during the existing national emergency, at the election of the Secretary of War (R. 2–3, 12). On the same day as the proceedings were instituted, the trial court, as requested in the petition, entered an order granting immediate possession to the United States (R. 18–30, 12, 17). Possession was taken on April 1, 1943 (R. 125). The original term having been extended for another yearly period, an amended petition was filed on August 4, 1943, redescribing the lands included in the original petition and describing additional lands to be taken for a term of years ending June 30, 1944, with the right to extend for yearly periods for the duration of the emer-

gency, and describing certain other lands to be taken in fee (R. 31–46). On November 19, 1943, the United States filed a declaration of taking stating that it was taking an estate for years commencing April 1, 1943, and ending June 30, 1944, extendable for yearly periods during the national emergency. This declaration applied to several tracts, including the one involved in this proceeding, and $67.50 was deposited in court as estimated compensation for the term taken in the tract here involved (R. 57–60). The term having again been extended for another year, a supplemental declaration of taking was filed on September 5, 1944, for the purpose of depositing $54.00 estimated compensation for the period July 1, 1944, to June 30, 1945 (R. 65–66).

The tract here involved (Tr. No. E–419) consists of 91 acres owned in fee by Brady P. Gentry and Carl Shamburger, subject to an oil and gas lease owned by General Crude Oil Company (R. 70, 72, 75–76, 105–114).[1] Commissioners appointed to determine compensation for the property taken filed their report on February 6, 1945,

[1] The oil and gas lease which was obtained from a former owner covered 233.2 acres (R. 106). Tract E–419 contains only 91 of the acres (R. 89–90). Under the oil and gas lease, the lessors reserved rights to one-eighth of oil produced and saved, one-eighth of the net proceeds derived from the sale of gas and gasoline or other products manufactured from the gas and sold by the lessee, and one-eighth of the market value in the field of gas sold by the lessee (R. 107–108).

awarding "damages to said tract of land and the just compensation for the taking therefor, in the sum of $20,475.00" (R. 67–68). Of this sum $11,375.00 was "for damages to the oil and gas mining leasehold estate" and the remaining $9,100 was for "all other damages by reason of such taking" (R. 67). The United States filed objections to the commissioners' award and requested a jury trial (R. 68–69). General Crude Oil Company thereupon filed an answer alleging that it was the owner of mineral leases "at the time the title to said premises and the oil, gas and mineral rights and interests therein, were condemned and acquired by the United States" and claiming that as a result of the taking the fair cash market value of its oil and gas lease had been diminished, depreciated, and damaged in the amount of $25,000 (R. 70–71). The fee owners answered, claiming that they had sustained damages in the sum of $15,000 (R. 72).

At a trial before a jury, it was contended that the oil and gas had been taken or its value destroyed, and the owners and the lessee offered to prove the fair cash market value of the oil and gas leasehold interest as of March 26, April 1, and November 19, 1943 (R. 76–77, 82–83, 99),[2] the diminution in the fair cash market value of the oil

[2] These dates represent the date of the order of possession (March 26), the date possession was actually taken (April 1) and the date of filing the first declaration of taking (November 19).

and gas leasehold interest as of March 26 and November 19, 1943, resulting from the condemnation (R. 83, 99); the fair cash market value of the full fee simple title of the land (R. 96–97); the market value of the mineral rights subject to the oil and gas lease (R. 99–100) and the diminution or depreciation in the fair cash market value of the fee including minerals (R. 97–98). The trial court excluded this evidence (R. 82–83, 96–98, 99) but admitted the annual fair cash rental value on an indeterminate lease of the lessee's rights under its oil and gas lease (R. 75, 85–90) and the fair cash rental value of the surface of the land (R. 95). The trial court ruled that the lessee could show the annual fair cash rental value of the land for all purposes—oil, mineral and surface purposes—including the right to occupy, operate, and explore for oil and gas (R. 86–90).

Petitioners' witness estimated such annual rental value at $1.50 per acre per year (R. 90). The same witness testified that the fair, cash rental value of the surface exclusive of the leasehold was $1.50 per acre per year (R. 95). Other witnesses testified, over the Government's objections (R. 100, 101), that General Crude Oil Company had applied to the Railroad Commission of Texas for a permit to drill, on April 13, 1943, subsequent to the taking by the United States (R. 101, 116–118), that the permit was granted (R. 103, 119–120), but that the Office of

the Division Engineer of the War Department had advised them that the right of ingress and egress for the exploration of oil on land leased by the Government could not be granted (R. 100, 114–115). The United States introduced no evidence of the value of Tract E–419.

On April 18, 1945, the jury returned its verdict awarding as annual rental or use for Tract E–419, $136.50 ($1.50 per acre) to the owners and the same sum to General Crude Oil (R. 123). Judgment was entered on May 11, 1945, fixing the annual rental in the amounts awarded by the jury and ordering the total sum then due the owners and lessee from April 1, 1943 (the date possession was taken), to June 30, 1945 (the date to which the interest taken had been extended), to be paid, together with interest at 6% on the difference between the deposits and the judgment from April 1, 1943, until the date of payment (R. 123–127). The judgment provided for payment at the same annual rate for future extensions and retained jurisdiction of the cause for such further orders as might be necessary (R. 127). The owners and the lessee appealed to the court below (R. 128).

The circuit court of appeals sustained the holding of the trial court that the estate taken should be valued as of April 1, 1943 when the Government took possession (R. 139). It affirmed the judgment awarding to the owners of the prop-

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erty an annual rental value of $1.50 per acre per annum (R. 139). However, it held that the award to the owner of the mineral lease was erroneous. The court reasoned that the leasehold owner had the absolute right to explore for and exploit the oil and gas, that the Government's successive annual extensions had deprived the lessee of such rights to the extent of each year taken and "one more extension will result in total destruction of the leasehold estate" (R. 137). The majority of the court concluded that compensation should be determined for each year by measuring the market value before and after the taking (R. 137–139). The court held, however, that in view of the fact that three years had elapsed, the procedure could be simplified upon a new trial by treating the three one-year takings as a single taking (R. 138). While agreeing with the other conclusions of the majority opinion, Judge Sibley took the view that the determination of compensation should be postponed until the year by year taking ceases or the mineral lease terminates (R. 141).

The war ended during the pendency of the appeal. The Army has ceased its activities at this camp and some of the land, which had been acquired in fee simple, has been declared to be surplus property. The temporary occupancy of the parcel here involved will not be extended beyond June 30, 1946, and, hence, the Government will have given up possession when the new trial

is had. These facts appear in the letter attached hereto as Appendix B, *infra*, p. 22.

ARGUMENT

1. In holding that the date of taking for purposes of valuation was April 1, 1943, the court below stated (R. 139) "We regard it as well settled that, either where no declaration of taking is filed, or where, as here, the declaration of taking is filed on a date subsequent to the actual passing of possession, the market value of the property taken should be determined as of the date possession was acquired." Petitioners do not, and cannot, deny that when no declaration of taking is used, the date of possession is the date of taking for valuation purposes. *United States* v. *Rogers*, 255 U. S. 163, 169; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299; *Jacobs* v. *United States*, 290 U. S. 13.

Plainly, the later filing of a declaration of taking does not change this result. *Bank of Edenton* v. *United States*, 152 F. 2d 251 (C. C. A. 4). It has been the practice, when possession is taken in advance of filing the declaration of taking, to determine value at the date of possession and to compute interest from that time.[3] Of course, when

[3] *United States* v. *6.87 Acres of Land, Etc.*, 147 F. 2d 351, 352 (C. C. A. 2); *United States* v. *412.715 Acres of Land, Etc.*, 60 F. Supp. 576, 577 (N. D. Cal.); *United States* v. *12,918.28 Acres of Land, Etc.*, 57 F. Supp. 893, 895 (W. D. La.); *United States* v. *17,280 Acres of Land, Etc.*, 57 F. Supp. 745 (D. Neb.); *United States* v. *Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258, 259, 260 (S. D. N. Y.).

possession has not previously been taken, value is determined at the date of filing the declaration of taking, as provided in the Declaration of Taking Act. *United States* v. *576.734 Acres of Land in Montgomery County, Pa.*, 143 F. 2d 408 (C. C. A. 3), and *United States* v. *Bennett*, 57 F. Supp. 670 (E. D. Wash.) relied upon by petitioners (Br. 10–11) were cases of that type. The Declaration of Taking Act, which provided a procedure by which the Government could secure possession and title, did not contemplate that the Government would have previously obtained possession. Hence, its provision as to date of taking cannot, as petitioners argue (Br. 5, 7, 8), be construed to govern cases where the Government secures possession, prior to the filing of a declaration of taking, by some other procedure, such as the Second War Powers Act. The latter Act permits the making of improvements prior to approval of title; hence the only reason for filing a declaration of taking in the instant case was to reduce interest liability and to make some funds available to the condemnees. Cf. *United States* v. *Miller*, 317 U. S. 369, 381.[4] Petitioners' contention (Br. 12–13) that the result of the decision

[4] The practice, here used, of obtaining possession under the Second War Powers Act, usually under a petition containing a perimeter description of a large area (R. 3–12), and subsequently filing a series of declarations of taking covering various tracts (R. 57–60), was frequently followed during the war when immediate action was necessary. Cf. *Catlin* v. *United States*, 324 U. S. 229.

below is unfair lacks merit because, if the contrary view were taken, the Government could deprive the owner of all use of his property for an indefinite period and yet choose the date of taking most unfavorable to him by filing the declaration of taking at a time when the market is lowest, or, if market prices have increased, not file a declaration of taking at all. It is much fairer to fix the date of valuation by the date of possession so that neither the Government nor the owner will suffer advantage or disadvantage from subsequent variations in the market.

United States v. *150.29 Acres of Land, Etc., in Milwaukee County,* 135 F. 2d 878 (C. C. A. 7) does not support a contrary conclusion (Cf. Br. 9–10). No question of date of taking for purposes of determining either value or liability of the United States for delay in payment was involved. The issue related to the right of the taxing authorities to share in the distribution of the total award.[5] The owners contended that the United States had "taken" the property when it took possession and, therefore, that taxes could not thereafter become a lien to be paid out of the award. Since the taxability of the property depended upon the date legal title passed to the United States, the court quite correctly held that

[5] For this reason, the Government had no interest in the outcome of the case and although it appeared, it took no position on the merits, and simply urged that if the taxes were a lien they should be paid out of the total award.

title did not pass until the filing of the declaration of taking. Cf. *United States* v. *412.715 Acres of Land, Etc.*, 60 F. Supp. 576, 577 (N. D. Cal.). Thus, in the *Milwaukee County* decision, the expression "date of taking" was used in the sense of date of taking title for the purpose of determining whether the property was constitutionally exempt from taxation and its use does not indicate disagreement with the court below.

2. Petitioners do not challenge the holding of the court below that the annual rental value awarded by the trial court to the owners represented adequate compensation for the temporary use of the land, aside from the alleged mineral value (R. 139). They do urge that the owners, like the lessee, "suffered a tangible loss in the value of their mineral estate" (Br. 19) and have an equal right to compensation therefor. In so doing, however, petitioners completely ignore the fact, relied upon by the court below, that, in the case of the lessee, as contrasted with that of the owners, the Government might retain possession beyond the term of the mineral lease and thus prevent the lessee from exercising any of its rights with respect to the minerals.

The judgment of the district court (R. 123–127) granted to the Government only an estate for years in the tract involved, and it is clear that such an estate carries with it no right to the underlying minerals. See 1 Summers, *Oil & Gas* (Perm. ed.) Sec. 32; 2 *id.* at Sec. 223. Since the

Government planned no extraction of minerals and, indeed, the judgment permitted none, the owners will, of course, have the same right in the minerals after the Government's occupancy ends as they did prior to the taking. As Judge Sibley stated (R. 141): "I do not think these fee owners show that anything has been taken from them but the surface use of their lands which they themselves testified was worth what was awarded them. Their minerals remain uninjured in the earth."

Since it was the lessees and not the owners who were deprived of the right to exploit the oil during the period of the Government's occupancy,* the only possible damage to the owners might be the loss of an opportunity to make a profitable sale of the land and underlying minerals, subject to the lease. Such damage, we submit, arising only from a loss of an opportunity to make business profits, is not compensable. *Omnia Co.* v. *United States,* 261 U. S. 502, 510, 513; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–282; cf. *Mitchell* v. *United States,* 267 U. S. 341; *Bothwell* v. *United*

* Whether and to what extent the lessee has a compensable interest because of the possibility that his lease may not survive the period of Government occupancy is a question the decision of which is no longer necessary in this case since the Government's occupancy will, in fact, end before the expiration of the ten-year lease. See *supra*, pp. 8–9. Upon a new trial it will appear whether there has been, in fact, a loss of value and, if so, what was the cause thereof. This consideration was itself sufficient to convince the Government that a cross-petition for a writ of certiorari in this case would not be appropriate.

States, 254 U. S. 231; see also *United States* v. *Petty Motor Company, et al.,* Nos. 77–83, this Term, slip opinion p. 5. This Court's decision in *United States* v. *General Motors Corporation,* 323 U. S. 373, 383, recognizes this rule, and is, therefore, not inconsistent with the decision below (cf. Pet. 10). The claim of petitioners is no different from that of any other land owner that, while the Government was in temporary occupancy, he lost a chance to sell the property at an enhanced price. The Fifth Amendment does not require the payment of damages for such lost opportunities.

Petitioners refer (Br. 16) to *Eagle Lake Improvement Co.* v. *United States,* 141 F. 2d 562 (C. C. A. 5), which held that when the United States condemned a fee simple title the value of the mineral interest might be considered. But in that case, since the Government had taken fee title, the owners were deprived of whatever mineral value the land might have. Here the owners have not been deprived of their rights in whatever minerals may exist; all that happened was that the enjoyment of those rights was postponed. Since the delay rentals compensate the owners for such postponement,[7] the denial

[7] Petitioners define the delay rentals as "the consideration * * * for the privilege of deferring lessee's development undertakings in the lease" (Br. 17). In the absence of any other evidence of value, therefore, such delay rentals were the proper measure of compensation for the postponement of the right to explore and produce oil.

of their claim was, we submit clearly correct, and the ruling on this issue does not create a conflict of decisions.

3. The majority of the court below held that compensation to the lessee should be determined annually. Judge Sibley took the position that the lessee's damages should be assessed in a single award made when the year-to-year taking ceases or the lease ends (R. 141). Petitioners take the view that compensation should be awarded in one lump sum at the time of taking (Br. 25–30). Before a new trial may be had, however, this difference in view as to the proper method of determining compensation will become a moot question, for the Government's occupancy will end at the latest on June 30, 1946. See *supra,* pp. 8–9. The majority opinion below recognized that the years already elapsed should be treated as a unit (R. 138). Thus, upon a new trial, compensation will be determined, as petitioners ask, in one proceeding and judgment (Br. 25). There is no reason, therefore, for further review of this issue in this case.

Moreover, the decision of the court below that, in the case of temporary takings like that here involved, compensation should be measured annually is, we submit, clearly correct. To adopt petitioners' suggestion would be to permit a trial court or a jury to speculate as to the duration of the Government's occupancy and to award a lump sum based on such speculation. Compensation should not be so computed. *United*

States v. *Certain Parcels of Land, etc.*, 55 F. Supp. 257, 264 (D. Md.); *United States* v. *16.747 Acres of Land*, 50 F. Supp. 389, 391 (D. Del.); cf. *United States* v. *5.741 Acres of Land in Flushing and Arde Bulova*, 51 F. Supp. 147, 148 (E. D. N. Y.); *United States* v. *Entire Fifth Floor in Butterick Building*, 54 F. Supp. 258, 261 (S. D. N. Y.); *Johnson* v. *United States*, 2 C. Cls. 391, 415–416, 419; *Johnson* v. *United States*, 4 C. Cls. 248, 251; *Pope* v. *United States*, 26 C. Cls. 11, 13. But cf. *United States* v. *9.94 Acres of Land in City of Charleston*, 51 F. Supp. 478 (E. D. S. C.); *United States* v. *60,000 Square Feet of Land known as Oakland Hotel*, 53 F. Supp. 767 (N. D. Cal.); *United States* v. *Bauman*, 56 F. Supp. 109 (D. Oregon).

CONCLUSION

The decision below is correct as to the questions urged by petitioners and there is no conflict. Moreover, one of the questions presented by petitioners will shortly become moot. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

J. EDWARD WILLIAMS,
Acting Head, Lands Division.

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APRIL 1946.

APPENDIX A

Title II of the Second War Powers Act (Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. (Supp. IV) 171a) provides as follows:

> SEC. 201. The Act of July 2, 1917 (40 Stat. 241), entitled "An Act to authorize condemnation proceedings of lands for military purposes," as amended, is hereby amended by adding at the end thereof the following section:
>
> "SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon

or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, 40 U. S. C. 258a–258e, reads as follows:

SEC. 1 * * * in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right-of-way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

SEC. 2. No appeal in any such cause nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

SEC. 3. Action under this statute irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the Chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

SEC. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay

the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of section 355 of the Revised Statutes of the United States: *Provided*, That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

APPENDIX B

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, 4 April 1946.

Refer to File No. CE 601.53. Camp Fannin, Texas. *U. S.* vs. *Brooks, Nat W., et al.* SPELE.

Mr. J. EDWARD WILLIAMS,
Acting Head, Lands Division,
Department of Justice, Washington, D. C.

DEAR SIR: Reference is made to the condemnation proceeding entitled *United States* vs. *11,000 acres of land, more or less, in Smith County, Texas, and Nat W. Brooks, et al.*, now pending in the United States District Court for the Eastern District of Texas, Tyler Division, to acquire land in connection with Camp Fannin, Texas. The file number of your department is 33–45–563–4.

The land included in the above-mentioned condemnation proceeding has been administratively determined to be surplus to the needs of the War Department and when necessary information concerning relinquishment of possession, decontamination and restoration have been received, the Attorney General will be formally requested to dismiss the proceeding. The Government will not extend the lease term beyond June 30, 1946.

For the Chief of Engineers:
Very respectfully,
(Signed) Joseph Connolly,
JOSEPH CONNOLLY,
Chief, Acquisition Div. Real Estate.

U. S. GOVERNMENT PRINTING OFFICE: 1946